

Exhibit

A

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY
CIVIL ACTION CASE NO. 2:08-CV-1567

DR. FADI CHAABAN; DR. SABINO R. TORRE, DR. CONSTANTINOS A. COSTEAS and DR. ANTHONY J. CASELLA, as Trustee of Diagnostic & Clinical Cardiology, P.A. Profit Sharing Plan,

Plaintiffs,

vs.

DR. MARIO A. CRISCITO

Defendant

Tuesday, June 16, 2009

MIAMI COURT REPORTING
CERTIFIED COURT REPORTERS
1741 DANIEL COURT
WALL, NJ 07719
(732) 681-4776

APPEARANCES:

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Attorneys for the Defendant

ALSO PRESENT:

Anthony Casella, M.D.

<u>I N D E X</u>			
		DIRECT	CROSS
		REDIRECT	RECROSS
1	WITNESS		
2	BRIAN WARNOCK		
3	BY MR. CHARME	6	
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6			
7			
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LITIGATION SUPPORT

1
2
3 DIRECTION NOT TO ANSWER
4 (None)

5 MOTION TO STRIKE
6 (None)

7 DOCUMENT REQUEST
8 (None)

12 EXHIBIT ANALYSIS

13 Original Exhibits Attached to Original
14 Transcript.

15 Copies of All Exhibits attached to
16 All Transcripts.

1 Q. Okay. Let me just give you some
2 instructions then.

3 A. Sure.

4 Q. I'm going to be asking you questions,
5 your answers are going to be recorded. If I ask you
6 something and you don't understand the question,
7 please tell me and I will do my best to clarify it for
8 you. Do you understand that?

9 A. Uh-hum.

10 Q. If you understand the question, I would
11 appreciate if you would give me a complete and honest
12 answer to it. Do you understand that?

13 A. Yes.

14 Q. If at some point you feel you need to
15 take a break, please tell me and I will try to
16 accommodate you. Do you understand that?

17 A. Yes.

18 Q. I have to ask you the last question.

19 Are you taking any kind of medicine or do
20 you have any kind of physical condition that would
21 stop you from understanding my questions and giving me
22 complete and honest answers?

23 A. No.

24 Q. Okay. Could you tell me your educational
25 background, if any, beyond high school.

1 B R I A N W A R N O C K ,
2 American Pension Corporation, 1375 Plainfield Avenue,
3 Watchung, New Jersey, sworn.

4 DIRECT EXAMINATION BY MR. CHARME:

5 Q. Good morning, Mr. Warnock. My name is
6 Stephen Charme. I represent the plaintiffs in the
7 lawsuit in which you were subpoenaed.

8 Are you represented by counsel today?

9 A. No.

10 Q. Okay. Are you aware that you have a
11 right to be represented by counsel?

12 A. Yeah.

13 Q. You've chosen --

14 A. I didn't --

15 Q. So you've chosen not to be represented by
16 counsel. Is that correct?

17 A. That's correct.

18 Q. Okay. Have you ever had your deposition
19 taken before?

20 A. Yes.

21 Q. How recently was the last time?

22 A. Maybe 2 or 3 years ago.

23 Q. What kind of case?

24 A. About 2 or 3 years ago. It was a case
25 involving work.

1 A. I have a degree in sociology from
2 Montclair State College.

3 Q. Is that a BA?

4 A. I guess a Bachelor of Science, actually.
5 Social sciences.

6 Q. And what year did you get that?

7 A. 1976.

8 Q. Okay. Could you state your date of
9 birth, please.

10 A. April 6th, 1954.

11 Q. Besides the bachelor's degree from
12 Montclair -- was it Montclair State?

13 A. Yes.

14 Q. Have you taken any other advanced
15 courses?

16 A. No.

17 Q. Would you tell me your employment
18 background starting when you graduated from college,
19 please.

20 A. I worked for Mutual Benefit Life
21 Insurance Company in their Pension Department for two
22 and a half years. Then I worked in Bankers National
23 Life Insurance Company.

24 Q. So it's two and a half years, say, to
25 what, 1979?

1 been more involved with just the calculating the
 2 contribution part. I don't know that I ever did the
 3 5500. I may have. I don't know -- I don't recall
 4 doing it. Typically someone else would have been
 5 assigned to doing that.

6 Q. Do you know who Dr. Mario Criscito is?

7 A. Yes, I do.

8 Q. When did you first learn of Dr. Criscito?

9 A. It would be early on in my appointment
 10 with APC.

11 Q. Okay. Did you ever personally meet him?

12 A. I don't recall ever meeting him in
 13 person, no. I spoke to him on the phone.

14 Q. Okay. When you spoke to him on the
 15 phone, do you recall what topics you discussed?

16 A. Could have been a termination claim,
 17 could be someone was leaving, they wanted us to send
 18 him the forms and calculate the -- tell him how much
 19 money that person would receive out of the plan. He
 20 could have called me. I remember sometimes he would
 21 call and say, one time he called and asked me for a
 22 copy of last year's report that we had sent the prior
 23 year. The contributions, I don't think he was
 24 involved in that.

25 Q. Let me ask you a different question.

1 Were you aware whether Dr. Criscito was a
 2 trustee of the DCC plan?

3 A. Yes. Yes.

4 Q. Were you aware if there were any other
 5 trustees besides him?

6 A. I would have to look at the document. I
 7 believe he was the only trustee.

8 Q. Okay. Now, you told me before that when
 9 you worked, I think at Mutual Benefit and you did Form
 10 5500's, that you would get information from the owners
 11 and the trustees to prepare those forms. Is that
 12 correct?

13 A. Correct.

14 Q. Did you get information from Dr.
 15 Criscito, you or someone else at APC that you know in
 16 order to prepare the Form 5500 for DCC?

17 A. Yes.

18 Q. You got that information from Dr.
 19 Criscito as opposed to Dr. Casella. Is that correct?

20 A. That is correct.

21 Q. Okay.

22 A. There was a -- let me clarify. Because
 23 the information came from a few different sources.
 24 With the individual accounts, there were about five
 25 doctors with individual accounts, they would either

1 send it personally, they might have given it to Dr.
 2 Casella to send to me, they might have given it to Dr.
 3 Criscito to send to me, they might have sent it
 4 themselves, but it was their own separate account so
 5 that information could have come from whoever it was
 6 convenient for them to do. They might have mailed it
 7 to me, they might have given it to Dr. Criscito, they
 8 may have given it to Dr. Casella to send on those
 9 separate accounts.

10 The statements that came for the, I'll

11 call it the rank and file employees for Morgan
 12 Stanley, I believe Morgan Stanley sent them directly
 13 to us. Any information regarding the account that
 14 Dr. Criscito was in came only from Dr. Criscito.

15 Q. Okay. You mentioned at some point in
 16 time there was something called a commingled account.
 17 Are you familiar with that term --

18 A. Yes.

19 Q. -- as it applies to DCC?

20 A. Yes.

21 Q. And as far as you knew, who was in the
 22 commingled account? I don't mean the individual
 23 names, I mean generally, who comprised it?

24 A. It was Mario Criscito, all of the rank

25 and file, clerical, whatever, and generally, the -- I

1 think the newer doctors were in the plan for the first
 2 couple of years.

3 Q. And am I correct that to get the
 4 information for the Form 5500 as to the valuation of
 5 the commingled account in which Dr. Criscito and other
 6 DCC employees were, you got that from Dr. Criscito?

7 A. Yes.

8 Q. And you got that from no one else?

9 A. Only from Dr. Criscito.

10 Q. Okay. Are you aware that at some point,
 11 Dr. Criscito took a loan from the plan?

12 A. I am aware of it because Dr. Casella told
 13 me that in the last year or something. I was not --

14 Q. Okay. I'm going --

15 A. We did a statement then, certainly we
 16 were aware of it.

17 Q. I'll show it to you. Give me a second.

18 MR. CHARME: I'm going to have the
 19 reporter mark as Warnock Exhibit 1 a document that is
 20 entitled "Loan Amortization Schedule."

21 (Exhibit Warnock-1 is received and marked
 22 by the Reporter for Identification.)

23 Q. Mr. Warnock, take a look at that and tell
 24 me if you've seen that before.

25 A. This would have been prepared by our

1 office. I'm sure I did see it at some point in time.
 2 Q. That was something prepared by APC?
 3 A. By APC, yes.
 4 Q. Okay. According to this it says
 "initial amount borrowed, \$250,000." Do you see that?

5 A. Yes.
 6 Q. Were you aware whether there was any
 7 limitation in the plan documents as to the amount of
 8 money that could be borrowed?
 9 A. Back in 1982, the limit -- you would have
 10 been able to take a very high loan. I don't recall
 11 exactly what the law was at the time, but he would
 12 have needed enough in his account to cover that. Now
 13 it's a \$50,000 limit. But that changed several years
 14 later.

15 Q. Did you recall reviewing the plan
 16 documents before this loan was taken out by Dr.
 17 Criscito to see if he could borrow this?

18 A. I don't specifically remember that. That
 19 would have been our normal practice.

20 Q. You don't remember doing that?

21 A. Do I remember doing this? No.

22 Q. Okay. I'm going to show you a series of
 23 documents that I'm going to mark as Warnock-2, have
 24 the reporter mark it before I give it to you.

1 (Exhibit Warnock-2 is received and marked
 2 by the Reporter for Identification.)

3 Q. What I'd like to do to save time is have
 4 you flip through these pages, and after you're done
 5 looking through, just tell me whether these were all
 6 prepared by American Pension Corporation. I believe
 7 they were because the name is at the bottom of each
 8 page, but I need you to confirm it.

9 A. Not this. This.

10 Q. I'm sorry. That's not part of it.

11 A. Yes. They were prepared by American
 12 Pension Corporation.

13 Q. Just so the record is clear, because
 14 inadvertently some other pages were handed to you.
 15 The first page of this document is Bate stamped 25387
 16 at the bottom, and the last page is Bate stamped
 17 25533. I just want to make sure we're all looking at
 18 the same thing.

19 A. It's difficult for me to read the 237.

20 Q. Yes. It is.

21 A. It looks like it is. The first --

22 Q. Let me say it. The first page says
 23 participant loan, and underneath that it says loan
 24 outstanding as of April 1, 1983.

25 A. Correct.

1 Q. And the very last page says balance
 2 sheet, March 31, 1991.

3 A. Yes.

4 Q. Okay.

5 MR. KERN: Steve, these are not in Bate
 6 stamped order.

7 MR. CHARME: That's correct, they're not.

8 MR. KERN: So why don't we read off the
 9 Bate stamps so we know what we're talking about.

10 MR. CHARME: Okay. The first page is
 11 25387, second is 25405. The next is 25388. The next
 12 is 25436. The next is 25404. The next is 25482. The
 13 next is 25495. The next is 25512, and the last is
 14 25533.

15 Q. Okay. If you look through these sheets,
 16 if you look at the next to the last page, it says
 17 balance sheet March 31, 1990, and under assets, it
 18 lists participant loan, and next to that it says
 19 65,439.02. Do you see that?

20 A. Yes.

21 Q. If you turn to the next page --

22 MR. KERN: Where are you looking? I got
 23 it.

24 Q. If you turn to the next page, which says
 25 balance sheet, March 31, 1991, there is no longer a

1 reference to the participant loan. Does that indicate
 2 that it was paid?

3 A. That would indicate it was paid.

4 Q. That's the reason it doesn't appear?

5 A. Yes.

6 Q. Okay. Do you know who prepared these
 7 documents?

8 A. Not without looking at the files, no.

9 Q. Do you recall if you did?

10 A. I may have. I don't recall, no.

11 Q. Okay.

12 A. I should just add to that, most likely I
 13 did not prepare them.

14 Q. Do you have any idea who in the office
 15 did?

16 A. In the 1990's, most likely Dominique.

17 MR. CHARME: Okay. I'm going to ask
 18 the reporter to mark another series of documents.

19 A. Let me change that answer, because I'm
 20 looking, it was 1991, maybe not Dominique. In the

21 later 1990's, in the last ten years, it would have
 22 been Dominique. Then it could have been anyone. So
 23 I could not say who did it in 1991.

24 Q. Okay. Is there --

25 MR. KERN: I assume it was somebody at

1 APC, though?

2 THE WITNESS: Oh, yeah.

3 A. If I had access to all the files, I would
4 be able to tell you.

5 Q. What would you have to look at to tell me
6 who prepared those?

7 A. I would probably have backup sheets that
8 I could recognize the handwriting of who did it.

9 MR. CHARME: Okay. I'm going to show
10 you what I'm asking the reporter to mark as Warnock-3,
11 which is a series of sheets. They're not in Bate
12 stamped order.

13 Steve, do you want me to read the Bate
14 stamps into the record?

15 MR. KERN: Wouldn't be a bad idea.

16 MR. CHARME: Okay.

17 (Warnock-3 is received and marked by the
18 Reporter for Identification.)

19 MR. CHARME: Just for the record, the
20 first page is Bate stamped 25430, the second is 25432.
21 The third is 25473. The next is 25475. The next is
22 25493. The next is 25527. The next is 25550.

23 Q. Do you have all those pages, Mr. Warnock?

24 A. The last page I don't have.

25 MR. KERN: 25550?

1 documents is yours?

2 A. It looks like the very first page, where
3 it says "off miscellaneous 49.12," that looks like
4 mine. And the "balance in liquid asset fund," where I
5 have 36,981 crossed out and that's my writing
6 underneath, 38,929.09.

7 Q. What about on the next page?

8 A. No. None of that's mine.

9 Q. And the next page, which is 25473?

10 A. No.

11 Q. And the next page, which is 25475?

12 A. No.

13 Q. The next page, which is 25493?

14 A. No.

15 Q. And the next page, which is 25527?

16 A. No.

17 Q. We've already discussed the last page.

18 Do you know, do you recognize any of the handwriting
19 that you can identify as belonging to someone else?

20 A. Well, I believe the majority is Mario
21 Criscito's.

22 Q. Let's start --

23 A. They were prepared by him.

24 Q. Let's start with the first page, which is

25 25430. Aside from the little bit of handwriting you

1 Q. You got it?

2 A. Yes.

3 Q. Once again, in an effort to save time, I
4 would like you to look through these, and if any of
5 the handwriting is yours, please tell me and then
6 we'll go through which handwriting is yours.

7 A. On the last page.

8 Q. The very last page, which is 25550?

9 A. Yes.

10 Q. What handwriting is yours?

11 A. Where it says "loan all paid."

12 Q. That's in the middle of the page?

13 A. Right.

14 Q. That is your handwriting?

15 A. That is my handwriting. And then where
16 it says "deposited before," looks like "March 31st,"
17 that's my handwriting, and the parentheses on the
18 sides, "30 plus 30 plus 5 for," and that would be
19 referring to the \$65,000.

20 Q. Do you know whose handwriting it is at
the bottom right where it says "loan has been paid
off"?

21 A. No.

22 Q. Okay. Aside from what you identified on
23 the last page, none of the other handwriting on these

1 identified as yours, you believe the other handwriting
2 is that of Dr. Criscito?

3 A. Yes.

4 Q. You're familiar with his handwriting?

5 A. Well, I've seen enough of these, they're
6 all coming from him, so --

7 Q. Turn to the second page. There is all
8 kinds of writing, and not all of it, unfortunately, is
9 legible. Do you see any writing on this page that you
10 believe is Dr. Criscito's?

11 A. I would say all the ones in the dark.

12 Q. All the ones that's in dark?

13 A. It looks like his. The one at the bottom
14 you can hardly see, it's hard to make out so I don't
15 know.

16 Q. So if you see in the middle of the page
17 it says "Israeli bond, \$25,000," do you believe it's
18 Dr. Criscito's handwriting as you move up the page?
19 In other words, the handwriting above where it says
20 "Israel bond, \$25,000"?

21 A. I believe this all came from Dr.
22 Criscito.

23 Q. Okay. The next page, 25473, do you
24 believe that's Dr. Criscito's handwriting?

25 A. I believe it is.

1 was basically a note to the attorneys who were copying
 2 the entire file. It was put on, you know, put on the
 3 top. That was a sticky that was stuck on the top. It
 4 was Joy Mercer, I think, who asked for all the
 5 accounts, so we got all the accounts and I put a
 6 sticky note on the top telling her what that is.

7 Q. Turn to the next page, which is Bate
 8 stamped 11954. Is that your handwriting?

9 A. Yes, I think -- is that the same one?
 10 They do not tie in. Yes, that is my handwriting.

11 Q. Am I correct, that's not the same as the
 12 note on the other page?

13 A. It's not the exact note, but it seems to
 14 mean the same thing.

15 Q. Could you read it.

16 A. "These are statements that Dr. Casella
 17 located in file. APC was unaware of them. Use info
 18 provided by Dr. Criscito -- used info provided by Dr.
 19 Criscito, that do not tie into Mario's numbers. Used
 20 to separate accounts as of 12/31/99 valuation."

21 Q. Do you know who you wrote that note for?

22 A. I believe that was also put in the file,
 23 it was a note for the attorneys. It's on a sticky, a
 24 little sticky on the top.

25 Q. I want to show you again what we marked

1 as Warnock-7, which is the Form 5500 for 1999.

2 A. Okay.

3 Q. The information that's on --

4 MR. KERN: What number is that again?

5 I'm sorry. Warnock-7.

6 Q. The information --

7 MR. KERN: Can you hang on for one
 8 second?

9 MR. CHARME: Sure.

10 MR. KERN: Okay.

11 Q. The information that's on Schedule I of
 12 that form is information that you got based on the fax
 13 that was sent to you as Warnock-10. Is that correct?

14 A. This is -- well, that would have been
 15 part of it. .

16 Q. That would have been part of it.

17 A. It includes the other accounts.

18 Q. Right, it includes the other accounts,
 19 but Schedule I includes the information that you
 20 received from Dr. Criscito on Warnock-10, correct?

21 A. Yes.

22 Q. So if the information on Warnock-10 is
 23 incorrect, that means the numbers on the Form 5500
 24 Schedule I are incorrect also?

25 A. That is correct.

1 Q. Okay. When you filed a Form 5500 for the
 2 year 2000, you used, on the Schedule I for 2000 -- and
 3 I will show it to you again -- we marked this as
 4 Warnock-8, you used the year end values from the
 5 previous Form 5500, did you not?

6 A. They would tie in.

7 Q. They would tie in, correct?

8 A. Yes.

9 Q. So am I correct, it's kind of like a
 10 domino effect; if the numbers are wrong on your 1999
 11 Form 5500, then the numbers are going to be wrong on
 12 each 5500 going forward because they rely on those
 13 earlier numbers?

14 A. Yes. This is a -- here is the 2000.

15 Yes. That is correct.

16 Q. Okay.

17 A. Yes.

18 Q. Do you know what would be required in
 19 order to correct the Form 5500 starting in 1999?

20 A. Well, it would be a lot of work, but we
 21 would file amended returns, amended 5500 forms.

22 Q. You said it would be a lot of work.

23 Tell me specifically what would have to be done.

24 A. To amend the 5500? We would have to go
 25 back and get the true values, the correct values that

1 should have been on there, and re-file, prepare new --
 2 excuse me. Can I get a drink of water?

3 MR. CHARME: Sure.

4 (There is a discussion off the record.)

5 A. We would have to get the correct
 6 information, and then most of the 5500 would not
 7 change, but the Schedule I, that's the one that's got
 8 all the numbers, then we would have to redo them each
 9 year.

10 Q. So you would have to redo Schedule I for
 11 each year starting in 1999 going forward, correct?

12 A. That is correct.

13 Q. Do you know if there are any interest or
 14 penalties that would occur?

15 A. There's no -- for filing an amended
 16 return, there's no penalty that goes with it, no.

17 Q. If you understated the true amount? If
 18 you know.

19 A. No, I'm not aware of any penalty that
 20 would go with an amended form. There's no excise tax
 21 or any form that you would attach. No.

22 Q. Okay.

23 (Luncheon recess.)

24 Q. Mr. Warnock, in order to redo the Form
 25 5500's, would it also be necessary to know all

1 Q. Your discussions with him, those five
 2 minute telephone conversations per year or so, were
 3 they generally cordial?

4 A. Yes.

5 Q. Friendly fellow?

6 A. He was friendly, but he could be -- he
 7 could be tough. He would warn me every year, Brian,
 8 I'm telling you, send this stuff, send it to me, make
 9 sure everything goes to me.

10 Q. Has that always been the case, since the
 11 beginning of your relationship?

12 A. Yes.

13 Q. So from the very onset of the
 14 relationship, he didn't want information concerning
 15 his account shared with other people, correct?

16 A. That's correct.

17 Q. Okay. Did he ever tell you that you
 18 couldn't share information with participants in the
 19 commingled account as that information pertained to
 20 their particular participation in the commingled
 21 account?

22 A. He said the only person who gets
 23 information is him, you know.

24 Q. Did anybody ask for -- let me ask the
 25 question another way.

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1 Were you ever asked for information,
 2 either by a participant or on behalf of a participant
 3 in the commingled account, and been unable to provide
 4 that information to that individual?

5 A. No. I mean the only question we
 6 would have gotten would have been, you know, what's
 7 their value of their account, and I probably provided
 8 it to him, to be honest. It would not have been a
 9 problem if, you know -- if, assuming the report was
 10 done and completed and the person wanted to know how
 11 much was in their account, I -- an awful lot of it, we
 12 would say ask Mario. I don't think he would have a
 13 problem giving that information out, though.

14 Q. Did you ever hear anyone complain that
 15 they couldn't get that information?

16 A. That they couldn't get the value of their
 17 account?

18 Q. Yes.

19 A. No.

20 Q. Would it, therefore, make sense that the
 21 information that he was seeking to maintain
 22 confidential was the amount of his own value in that
 23 account?

24 MR. CHARME: I object to the form. That
 25 wasn't the testimony at all.

1 Q. You can answer it.

2 A. Yeah. Yes.

3 Q. Okay. He didn't care if other people
 4 knew their individual account balances, as far as you
 5 can tell?

6 A. Right. He didn't want people to know
 7 what his account was worth, and you know, he also --
 8 he pretty much prided himself as being a good stock
 9 picker, and didn't want people privy to, you know,
 10 what stocks he was picking. For whatever reason, he
 11 felt that was, you know, his picks to do that, and he
 12 didn't want to share it with other people.

13 Q. Would it also have been prudent for Dr.
 14 Criscito to not want information concerning other
 15 individuals' account balances shared with third
 16 parties?

17 A. It depends on who the third parties were.
 18 He certainly didn't want a secretary opening up the
 19 mail and seeing a report that had everybody's money.
 20 Certainly he did not want that to happen.

21 Q. Would that be a good reason why he would
 22 want the information sent to his home rather than to
 23 the office?

24 MR. CHARME: I object to the form.

25 A. That would be a reason, and fairly

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1 typical, and we have several clients where we send
 2 everything to their home.

3 Q. To your knowledge, were employees, as
 4 opposed to physician employees, or non-physician
 5 employees aware of the discrepancy contribution
 6 percentages between themselves and physicians?

7 A. I have no idea.

8 Q. Would that generally be information that
 9 an employer would not necessarily want to share with
 10 employees?

11 MR. CHARME: I object to the form.

12 A. I think most employees know the big guys
 13 get more money than they do. It's not a shock to
 14 them, but they may not want everyone to know that they
 15 got 20 percent and everyone else got 5, yes.

16 Q. Would that be a reasonable business
 17 determination?

18 A. That would be reasonable, yes.

19 Q. From your review of the loan that was
 20 taken out by Dr. Criscito, I believe it was 1982, was
 21 that properly paid back? Was that all appropriately
 22 accounted for?

23 A. As far as I can -- the only discrepancies
 24 were, you know, the one that was cited, you know. We
 25 told them, they put in extra money in the plan, rather

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1 answered.

2 A. No, that -- the contribution receivable,
3 yes, that came from us.

4 MR. KERN: We're going to need to stop
5 now and have to come back.

6 (There is a discussion off the record.)

7 (At 3:45 p.m., the deposition is

8 adjourned.)

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1 CERTIFICATION

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5 I, NANCY A. MIANI, a Certified Court Reporter
6 and a Notary Public, License No. XI00814, do hereby
7 certify that the foregoing witness, BRIAN WARNOCK, was
8 duly sworn by me on the date indicated, and that the
9 foregoing is a true and accurate transcription of my
10 stenographic notes.

11 I further certify that I am not employed by
12 nor related to any party to this action.

13

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16 NANCY A. MIANI, C.S.R.
17 LICENSE NO. XI00814

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